Petition

81-654

No.

FILED
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In the Supreme Court of the United States

October Term, 1981

DANIEL J. SUPANICK,
Petitioner,

vs.

EVELYN SUPANICK,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED

Whether petitioner was denied equal protection of the law when the Supreme Court of Ohio refused to permit the courts of Ohio to consider his (and all those similarly situated) motion to modify his divorce and alimony decree on the basis that such decree had been entered prior to June 23, 1976 although it permitted a modification in *Wolfe v. Wolfe* (1976), 46 Ohio St. 2d 399 even though the decree therein had been entered in 1968.

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No.

In the Supreme Court of the United States

October Term, 1981

DANIEL J. SUPANICK,
Petitioner,

vs.

EVELYN SUPANICK,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

The petitioner, Daniel J. Supanick, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered on June 10, 1981 reversing the judgment of the Court of Appeals of Lake County, Ohio, dated July 14, 1980.

OPINIONS BELOW

The judgment of the Supreme Court of Ohio reversing the judgment of the Court of Appeals of Lake County Ohio; the opinion of the Supreme Court of Ohio; the judgment entry of the Court of Appeals of Lake County, Ohio reversing the judgment of the Court of Common Pleas of Lake County, Ohio; the opinion of the Court of Appeals of Lake County, Ohio; the judgment entry of the Court

of Common Pleas of Lake County, Ohio denying petitioner's Motion to Modify or Vacate; the opinion of the Court of Common Pleas of Lake County; and the Findings of Fact and Conclusions of Law and Judgment of the Court of Common Pleas of Lake County, Ohio.

JURISDICTION

The Supreme Court of Ohio reversed the judgment of the Court of Appeals of Lake County, Ohio, on June 10, 1981. On September 3, 1981, which was within 90 days of said judgment, the Supreme Court of the United States ordered that the time for filing a petition for writ of certiorari in this cause be extended to and including October 7, 1981. This petition for certiorari was filed on or before said date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Rules of Civil Procedure Rule 60 (B) (4) & (5)
Relief From Judgment or Order

"(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules."

STATEMENT OF CASE

The parties entered into a separation agreement on December 13, 1968 whereby it was agreed that they would live separate and apart and that the respondent-wife would receive the marital home and almost all of the marital assets. In addition to such major property settlement, the petitioner-husband agreed to pay to his wife $309.00 per month for her support until she remarried or died. The petitioner was not represented by counsel and signed the separation agreement in the belief held contrary to the unambiguous terms of the agreement that his obligation to pay alimony to his ex-wife would be ended after five years.

The case proceeded to trial as an uncontested case on the wife's petition for divorce and the separation agreement was incorporated into the decree of the Court which was entered on April 18, 1969. The decree contained no reservation of modification jurisdiction.

On May 17, 1977 petitioner sought to modify the divorce decree in respect to his obligation for monthly support payments for the respondent on the grounds of changed circumstances or in the alternative for relief under Ohio Civil Rule 60 (B) (4) & (5) authorizing a court to grant relief from a judgment on the ground that it is no longer equitable that such judgment should have prospective application.

Upon hearing, the trial court concluded that without a reservation of jurisdiction in the decree it had no authority to modify the monthly alimony award and that the new rule enunciated in *Wolfe v. Wolfe* (1976), 46 Ohio St. 2d 399 could only be applied to decrees entered after the date of the opinion in that case. Thus, the trial court overruled petitioner's motion to modify or vacate.

The petitioner then appealed to the Court of Appeals of Lake County, Ohio which reversed the judgment of the trial court and remanded the cause for further proceedings. Thereafter, the Supreme Court of Ohio granted the respondent's motion to certify the record.

The Supreme Court of Ohio in a *per curiam* opinion ruled that the statement in the opinion of *Wolfe v. Wolfe* (1976), 46 Ohio St. 2d 399 stating that, "Our holding herein is to be applied prospectively only to decrees incorporating separation agreements entered after the date of this judgment" was binding on the courts of Ohio and, therefore, the trial court was correct in ruling that it had no jurisdiction to even consider affording the petitioner any relief. The judgment of the court of appeals was thus reversed.

REASONS FOR GRANTING THE WRIT

The petitioner is attempting to modify an alimony award rendered in 1969 which had been based on a separation agreement of the parties entered into in 1968. On June 23, 1976 the Supreme Court of Ohio in *Wolfe v. Wolfe* (1976), 46 Ohio St. 2d 399 held in syllabus 2 of its opinion as follows:

> "Where, upon granting a divorce, a court awards alimony to a wife, pursuant to an agreement of the parties, to be paid until the condition subsequent of remarriage or death of the wife, and such award is for her sustenance and support and independent of any award arising by adjustment of the property rights of the parties, *reservation of jurisdiction to modify the award will be implied in the decree.*" (Emphasis added.)

The *Wolfe* case enunciated a new rule for the courts of Ohio. Prior to *Wolfe* the law of Ohio had been that a

divorce decree based on an agreement of the parties could not be modified unless the court expressly reserved modification jurisdiction. *Newman v. Newman* (1954), 161 Ohio St. 247; *Mozden v. Mozden* (1954), 162 Ohio St. 169.

However, the Supreme Court of Ohio limited the application of its new rule. The last two sentences of the majority opinion in *Wolfe* state:

> "In holding herein that modification jurisdiction continues as to alimony sustenance awards, even though based upon agreements of the parties, we perceive that immeasurable difficulties will arise in attempting to judicially determine the character of the award in a given case. Therefore, while we apply the rule here because the separation is clearly manifested, *our holding herein is to be applied prospectively only to decrees incorporating separation agreements entered after the date of this judgment.*" (Emphasis added.)

The *Wolfe* opinion states that Mr. and Mrs. Wolfe entered into a separation agreement on November 14, 1967. A decree of divorce which incorporated that agreement by reference was rendered on January 2, 1968. On December 18, 1973, the husband moved, *inter alia*, that he be relieved of making further alimony payments to his ex-wife. The Supreme Court of Ohio held that the trial court had the authority to modify the decree even though based on an agreement of the parties and overruled its previous holdings to the contrary.

In the case at bar, the separation agreement of the parties was entered into on December 13, 1968. An uncontested divorce was granted to the respondent on April 18, 1969. Thereafter, on May 17, 1977 the petitioner sought to terminate his monthly alimony payments for the support of the respondent citing the new rule set forth *Wolfe v.*

Wolfe. The Supreme Court of Ohio held that the new rule in *Wolfe* could not be applied to petitioner's case since the separation agreement and the divorce decree in his case were entered before the date of the *Wolfe* decision (June 23, 1976).

The parties in the *Wolfe* case had entered into a separation agreement in 1967 and were granted a divorce on January 2, 1968. Yet, Mr. Wolfe *was* entitled to have his case reviewed for possible relief but not petitioner!

In the case at bar, two justices of the Ohio Supreme Court recognized the unequal treatment afforded to the petitioner and stated in their dissenting opinion that the holding of the majority resulted in *"one standard of justice for the litigants in Wolfe, and a different standard for hundreds of litigants in other cases situated similarly to the Wolfes."* (Emphasis added). *Supanick v. Supanick* (1981), 66 Ohio St. 2d 360.

Why was Mr. Wolfe entitled to relief while under almost identical circumstances the petitioner and the multitude of persons who entered into separation agreements at or near the time the Wolfes entered into their agreement are not entitled to have their claim for relief even *considered?*

When this cause was being heard in the trial court, petitioner's counsel argued and set forth in his written brief filed after the hearing that, *"the law as enunciated in the syllabus of Wolfe must be applied equally to all citizens under similar circumstances * * *"* (emphasis added) (page 6 Defendant's Brief in Support of Motion). On pages 7 and 8 of petitioner's brief filed in the Ohio Supreme Court he argued:

> "In *Wolfe*, this court has concluded that in the interest of fairness and justice a trial court will retain modifica-

tion jurisdiction in all cases where monthly installments of alimony for sustenance and support have been awarded for an indefinite period of time as long as such award was not related to a division of property. *Why shouldn't that holding apply to all cases and citizens coming before the courts?*" (Emphasis added.)

One of the principles on which this government was founded is that of equality of right, and this principle is emphasized in the equal protection clause of the Fourteenth Amendment. *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 78 L. Ed. 1411. The Constitution of the United States is no respecter of the financial status of persons, and rich and poor are to be accorded equal rights under it. *Schilb v. Kuebel*, 404 U.S. 357, 30 L. Ed. 2d 502.

Under the Fourteenth Amendment, "due process" emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated; "equal protection", emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable. *Ross v. Moffitt*, 417 U.S. 600, 41 L. Ed. 2d 341. The inhibitions of the Fourteenth Amendment include all the departments of state government, including the judicial. *Burrows v. Jackson*, 346 U.S. 249, 97 L. Ed. 1586.

Equal protection of the laws of a state is extended to persons within its jurisdiction within the meaning of the Fourteenth Amendment to the Federal Constitution, when its courts are open to them on the same conditions as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts. *Truax v. Corrigan*, 257 U.S. 312, 66 L. Ed. 254.

Equal protection of the law requires that all those similarly situated be treated and entitled to the same protections and benefits of the rules of law enunciated by the highest court of a State.

CONCLUSION

In *Wolfe v. Wolfe*, the Supreme Court of Ohio enunciated a new rule of law which permitted the husband to modify a decree of the court in regard to alimony even though it had originally been rendered in 1968.

Petitioner, herein, seeks the same relief. The court decree in his case was rendered in 1969. Yet, the Supreme Court of Ohio refused to permit the trial court to consider petitioner's motion, holding that the court lacked the necessary modification jurisdiction since the decree in petitioner's case was rendered before June 23, 1976.

The same is true for all other litigants in Ohio with the exception of Mr. Wolfe. He was afforded relief! What about all of the other citizens of Ohio? Can this be "equal protection of law?"

Respectfully submitted,

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APPENDIX

JUDGMENT OF THE SUPREME COURT OF OHIO

(Dated June 10, 1981)

No. 80-1186

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

EVELYN SUPANICK,
Appellant,

vs.

DANIEL J. SUPANICK,
Appellee.

MANDATE

To the Honorable Common Pleas Court Within and for the County of Lake, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed for the reasons set forth in the opinion rendered herein.

THOMAS STARTZMAN
Clerk

OPINION OF THE SUPREME COURT OF OHIO

(Decided June 10, 1981)

No. 80-1186

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

EVELYN SUPANICK,
Appellant,

vs.

DANIEL J. SUPANICK,
Appellee.

APPEAL from the Court of Appeals for Lake County.

On April 18, 1969, appellant, Evelyn Supanick, obtained an uncontested divorce from appellee, Daniel Supanick. The divorce decree incorporated a separation agreement that the parties had entered into on December 18, 1968. Pursuant to the separation agreement, appellant received the marital home and almost all of the marital assets. In addition, she was to receive support alimony in the amount of $309 a month until she remarried or died. The separation agreement did not contain a reservation of jurisdiction.

On May 17, 1977, appellee filed a motion to vacate or modify the portion of the divorce decree requiring him to pay $309 monthly in support alimony. Appellee asserted that it was no longer equitable to require him to pay this alimony because of changed circumstances.

In September 1978, appellant filed a motion to reduce unpaid alimony installments to judgment.

On October 31, 1979, the trial court overruled appellee's motion to modify or vacate, and granted judgment in favor of appellant on the arrearages. The trial court concluded that without a reservation of jurisdiction in the divorce decree, the court had no authority to modify the alimony award. The trial court pointed out that the law enunciated by this court in *Wolfe v. Wolfe* (1976), 46 Ohio St. 2d 399, to the effect that a reservation of jurisdiction to modify a sustenance and support alimony award would be implied by the court, was only to be applied to decrees entered after the date of the judgment in that case, and so was inapplicable here.

Appellee appealed the judgment of the trial court overruling his motion to modify or vacate. The Court of Appeals reversed. It held that the language in *Wolfe, supra*, providing that the opinion was to have only prospective application, was dictum.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

* * * * *

Per Curiam. The sole issue raised in the instant cause is whether this court's holding in *Wolfe, supra*, that a reservation of jurisdiction to modify a sustenance and support award will be implied in a divorce decree, should be applied retroactively.

This issue was addressed and settled in *Wolfe*. In the last two sentences of the majority opinion, at pages 421-422, the court stated:

"In holding therein that modification jurisdiction continues as to alimony sustenance awards, even though based upon agreements of the parties, we perceive that immeasurable difficulties will arise in attempting to judicially determine the character of the award in a given case.

Therefore, while we apply the rule here because the separation is clearly manifested, *our holding herein is to be applied prospectively only to decrees incorporating separation agreements entered after the date of this judgment.*" (Emphasis added.)

While it is the general rule that the syllabus of the case states the law, "the rule does not substitute the syllabus for the court's order or judgment, from which must be determined the issues decided by the court." *Burton, Inc. v. Durkee* (1954), 162 Ohio St. 433, paragraph one of the syllabus. Although not contained in the syllabus, the court's statement that *Wolfe* did not apply retroactively was part of the court's decision. The Court of Appeals erred in concluding that the language was only dictum.*

Therefore, the judgment of the Court of Appeals is reversed.

Judgment reversed.

CELEBREZZE, *C. J.*, W. BROWN, P. BROWN, LOCHER and HOLMES, *JJ.*, concur.

SWEENEY and C. BROWN, *JJ.*, dissent.

CLIFFORD F. BROWN, *J.*, dissenting. It is my view that the holding in *Wolfe v. Wolfe* (1976), 46 Ohio St. 2d 399, paragraph two of the syllabus, that a reservation of jurisdiction in a divorce decree to modify a sustenance and permanent alimony award upon a change of circumstances will be implied in the decree, constitutes a rule which should be applied retrospectively as well as prospectively. I would apply the holding in *Wolfe* to separation agree-

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*Other Courts of Appeals, when addressing the issue, have found the language in *Wolfe*, providing that it is not to be applied retroactively, to be dispositive of the issue. *E.g.*, *Reimer v. Reimer* (Ct. App. Cuyahoga Co. June 12, 1980), No. 40648, unreported; *Degen v. Degen* (Ct. App. Franklin Co. April 5, 1979), No. 78 AP 679, unreported.

ments and divorce decrees entered into prior to the date of that decision.

Retrospective application of the rule in *Wolfe*, to all separation agreements and divorce decrees prior to June 23, 1976, is consistent with elementary justice. Otherwise there is one standard of justice for the litigants in *Wolfe*, and a different standard for hundreds of litigants in other cases situated similarly to the Wolfes.

A conclusion and decision that *Wolfe* should be applied prospectively only to decrees after June 23, 1976, requires as a logical consequence that the *Wolfe* holding should not have been applied to the divorce and alimony decree in the *Wolfe* case itself. That decree incorporated a separation agreement of the parties dated November 14, 1967 and entered on January 2, 1968. In short, that 1976 decision was a retrospective application of the *Wolfe* rule to a 1967-1968 separation agreement incorporated into a divorce decree. Neither *stare decisis* nor any rule of law requires this court to apply paragraph two of the syllabus in *Wolfe* prospectively only, and thereby reach an unjust result.

As one last observation, our decision today allows alimony awards based on separation agreements written prior to *Wolfe* to stand uncorrected and uncorrectable, since continuing jurisdiction to modify sustenance awards applies only to such agreements and divorce decrees made after June 23, 1976. Our decision today totally eliminates judicial review of the multitude of divorce decrees based upon separation agreements drafted at any time before *Wolfe*.

I would affirm the judgment of the Court of Appeals.

SWEENEY, J., concurs in the foregoing dissenting opinion.

JUDGMENT ENTRY OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed July 14, 1980)

Case 7-240

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

EVELYN SUPANICK,
Appellee,

vs.

DANIEL J. SUPANICK,
Appellant.

JUDGMENT ENTRY

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the Trial Court is reversed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's *Announcement of Decision* which is incorporated hereby by reference.

No other error appearing in the record, *judgment reversed and cause remanded for further proceedings.*

It is ordered that appellant recover of appellee the costs herein.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ EDWIN T. HOFSTETTER
Judge for the Court

ANNOUNCEMENT OF DECISION OF THE COURT OF APPEALS FOR LAKE COUNTY, OHIO

(Filed July 14, 1980)

Case No. 7-240

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT
COUNTY OF LAKE

EVELYN SUPANICK,
Appellee

vs.

DANIEL J. SUPANICK,
Appellant.

ANNOUNCEMENT OF DECISION

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties. Upon consideration whereof, this Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the Trial Court is reversed. Each assignment

of error was reviewed and, upon review, the following disposition made:

The statement of the case, as set forth by the appellant, is not disputed by the appellee, and thus is repeated herein as follows:

On April 18, 1969, the trial court entered its decree granting plaintiff an uncontested divorce. The decree incorporated a separation agreement of the parties which was dated December 18, 1968.

The separation agreement provided for the division of all of the property of the parties, custody and support of the minor child, and monthly payments of alimony to the wife in the sum of $309.00 per month until her remarriage or death.

After more than nine years, on May 17, 1977, defendant sought to terminate the obligation to pay monthly alimony installments to plaintiff and filed a motion to modify or vacate the decree of the Court. In September, 1978, plaintiff filed a motion to reduce unpaid installments of alimony to judgment.

Hearing was had and on October 31, 1979, the trial court overruled defendant's motion to modify or vacate and granted plaintiff judgment against defendant in the sum of $1,545.00 for the accrued unpaid installments of alimony.

Defendant filed a timely motion for findings of fact and conclusions of law which were made and filed by the trial court. Defendant then filed his notice of appeal to this Court.

The Findings of Fact of the Court are as follows:

1. On December 18, 1968, the parties signed a separation agreement.

2. The plaintiff wife received the marital home and almost all marital assets with the exception of a car and some stocks she agreed to hold for the benefit of the parties' minor daughter.

3. In addition to such liberal property settlement, defendant husband agreed to pay to the wife $309.00 per month as alimony until she remarried or died.

4. Except for the house and Arizona property mortgage installments, which were considered to arrive at the $309.00, said monthly alimony payments were intended as support and were not related to the division of property between the parties.

5. Defendant husband signed said separation agreement in the belief held contrary to the unambiguous terms of the agreement, that his obligation to pay alimony would end after five years.

6. The case proceeded to judgment on an uncontested basis and the separation agreement became a court order in April 1969.

7. Circumstances have changed in that plaintiff wife is making her own living in Florida, she owns a house mortgage free, the minor child of the parties is an adult and emancipated.

8. In 1969, the defendant husband earned approximately $13,000.00, and in 1979 his earnings will be approximately $30,000.00, per year.

9. There was no credible evidence as to fraud or mutual mistake at the time the agreement was signed.

10. There is no reservation of jurisdiction in the separation agreement.

The Conclusions of Law are as follows:

1. Without a reservation of jurisdiction the Court has no authority to modify the alimony award.

2. The law enunciated the *Wolfe v. Wolfe*, 46 Ohio St. 2d 399 (1976), can only be applied to decrees entered after the judgment in the *Wolfe Case*.

3. Defendant's motion to modify or vacate is overruled and judgment is hereby entered accordingly.

The judgment of the trial court that was appealed overruled defendant's motion to modify or to vacate. For his One Assignment of Error, the defendant says that:

THE TRIAL COURT ERRED IN DETERMINING THAT IT HAD NO AUTHORITY TO MODIFY THE ALIMONY AWARD AND IN FAILING TO GRANT DEFENDANT'S MOTION TO MODIFY OR VACATE.

It is apparent, from the Findings, that the trial court based its findings totally on its understanding of *Wolfe v. Wolfe* (1976), 46 Ohio St. 2d 399.

We note that paragraph 2 of the syllabus in *Wolfe* clearly and unambiguously states:

> Where, upon granting a divorce, a court awards alimony to a wife, pursuant to an agreement of the parties, to be paid until the condition subsequent of remarriage or death of the wife, and such award is for her sustenance and support and independent of any award arising by adjustment of the property rights of the parties, reservation of jurisdiction to modify the award will be implied in the decree.

We note that Civil Rule 60(B) states, in pertinent part:

> On motion and upon such terms as are just, the court *may relieve* a party . . . from a final judgment . . . for the following reasons: . . . (4) . . . it is no longer equitable that the judgment should have prospective application; . . . (Emphasis by italics added.)

Within the context of the rule, the trial court clearly had the jurisdiction to modify the alimony award if the evidence warranted a modification.

Within the context of paragraph 2 of the syllabus of *Wolfe, supra,* even when no reservation of jurisdiction was noted in the separation agreement, the trial court's right to modify the award will be implied in the decree.

With the above authority of a trial court expressed not only under the Civil Rules, but by syllabus in case law, the only remaining question is: What credence or significance should the trial court have attached to the last two sentences in Justice Brown's opinion in *Wolfe, supra,* which said:

> In holding herein that modification jurisdiction continues as to alimony sustenance awards, even though based upon agreements of the parties, we perceive that immeasurable difficulties will arise in attempting to judicially determine the character of the award in a given case. Therefore, while we apply the rule here because the separation is clearly manifested, our holding herein is to be applied prospectively only to decrees incorporating separation agreements entered after the date of this judgment.

We note there were no immeasurable difficulties in the instant case in attempting to judicially determine the character of the award, i. e., division of property or sustenance. Neither do we subscribe to the statement that mere difficulties "in attempting to judicially determine the

character of an award in a given case" should relegate the effectiveness of *Wolfe* only to decrees entered after the date of the *Wolfe* judgment. There is not such clarity in *Wolfe* that legal counsel, after the *Wolfe* decision, will clearly and routinely draft separation agreements that will require no judicial determination of their meaning. Further, Justice Brown's final statement applying the *Wolfe* case only prospectively flies in the face of the earlier statement in his appeal that said:

> The holding in this case, that a court has continuing modification jurisdiction over alimony for sustenance awards, is to assure that such awards are continually just.

How can there be an assurance that such awards are continually just if the power of continuing modification jurisdiction for sustenance awards applies only to agreements entered into after June 23, 1976, and totally eliminates judicial review of the obvious multitude of divorce decrees based on separation agreements drafted years prior to *Wolfe?*

It would appear that the syllabus in a Supreme Court case announces the law, and an individual opinion merely states the opinion of the writer. "Where the judge writing an opinion discusses matters or gives expression to his views on questions not contained in the syllabus, it is merely the personal opinion of that judge." *State, ex rel. Donahey v. Edmondson* (1913), 89 Ohio St. 93.

The truth of that statement from *Donahey, supra,* was again emphasized by Justice Leach in 1971 in *Fox v. Morrison Motor Freight, Inc.,* 25 Ohio St. 2d 193, in a concurring opinion joined in by three other justices, when he said:

> By this concurring opinion I hope to again remind the bench and bar of this state of the long-es-

tablished rule of this court that the syllabus of an opinion is the only part of the opinion requiring the approval of the members concurring in the judgment, and of the fact that "where the judge writing the opinion discusses matters or gives expression to his views on questions not contained in the syllabus, it is merely the personal opinion of that judge." *State, ex rel. Donahey, v. Edmondson* (1913), 89 Ohio St. 93, at page 107. See, also, *Charles A. Burton, Inc., v. Durkee* (1954), 162 Ohio St. 433.

In cases of conflict between the syllabus and the opinion, the former governs. See 14 O. Jur. 2d, Courts, § 247. In light of the clear authority expressed in paragraph 2 of the syllabus in *Wolfe*, without regard to time of its effectiveness, which clearly could have been included had the other members of the Court agreed, the last two sentences of the opinion are clearly dicta expressing only the attitude of its author.

We note also that in *Wolfe*, assuming arguendo that the opinion spoke for the Court, only three justices concurred without comment. One justice concurred in only paragraphs 1, 2, and 4 of the syllabus and judgment and wrote a concurring opinion emphasizing that when a separation agreement merges into a decree of divorce when incorporated therein the decree is thereafter subject to the continuing jurisdiction of the trial court so that it may be modified in the event of demonstrated need for such modification. This reasoning is in stark contrast to the "prospective application only" expressed by the author of the principal opinion.

Of the three justices concurring in the judgment without comment, none are now on the Court. One is deceased, one is retired from the Supreme Court, and the third was

an appellate judge sitting by assignment. Two justices of the remaining justices dissented, including the present chief justice.

We hold, therefore, that although the judgment in *Wolfe* was res judicata of that matter, the dicta of the author of the opinion, in the limited manner it was supported, does not reach the proportion of stare decisis requiring us to abandon our independent reasoning or judgment. We, therefore, follow paragraph 2 of the syllabus in *Wolfe* and the authority of Civil Rule 60(B)(4) and agree with the appellant that the trial court erred in determining it had no authority to modify the alimony award.

Judgment reversed and cause remanded for further proceedings consistent herewith.

/s/ EDWIN T. HOFSTETTER
Judge

DAHLING, *P. J.*,
COOK, *J.*, concur

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO

(Filed October 31, 1979)

Case No. 49915

IN THE COURT OF COMMON PLEAS
DEPARTMENT OF DOMESTIC RELATIONS
LAKE COUNTY, OHIO

EVELYN SUPANICK,
Plaintiff

vs.

DANIEL J. SUPANICK,
Defendant.

JUDGMENT ENTRY

This matter came on for hearing before the Honorable Hans R. Veit on Defendant's Motion to Modify and upon Plaintiff's Motion to Reduce Arrearage to Judgment.

It appearing to the Court that the Defendant was ordered to pay the sum of $309.00 per month as alimony to Plaintiff until death or remarriage;

It further appearing to the Court that there is an arrearage in said alimony in the sum of $1,545.00;

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that judgment be and is hereby rendered in favor of Plaintiff against Defendant, Daniel J. Supanick, in the sum of One Thousand Five Hundred Forty-Five

Dollars ($1,545.00), upon which judgment execution may issue.

It further appearing to the Court from all the evidence that there was no fraud or mutual mistake at the time of the exection of the Separation Agreement, and further that this Court has no authority to modify the alimony award;

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Defendant's Motion to Modify or to Vacate be and is hereby overruled.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all prior orders of court remain in full force and effect, all at Defendant's costs.

/s/ HANS R. VEIT
Judge

OPINION OF THE COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO

Case No. 49915

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
LAKE COUNTY, OHIO

EVELYN SUPANICK,
Plaintiff,

vs.

DANIEL J. SUPANICK,
Defendant.

OPINION

On December 18, 1968, the parties signed a separation agreement. The wife received almost all marital assets, with the exception of a car and some stocks she agreed to hold for the benefit of the parties' daughter.

In addition to such liberal property settlement, the husband agreed to pay to the wife $309.00 per month as alimony until she remarried or died. The evidence is uncontroverted that these monthly installments were intended as support payments.

The husband signed the agreement in the belief, held contrary to the unambiguous terms of the agreement, that his obligation to pay alimony would end after five years. The case proceeded to judgment on an uncontested basis,

and the separation agreement became a court order in April, 1969.

Now circumstances have changed. The wife is making her own living in Florida. She owns a house, mortgage-free. Understandably the husband wants his support of her to end. He does not want to pay her a pension.

But from the facts presented the court cannot find fraud or mutual mistake at the time the agreement was signed. Without a reservation of jurisdiction, the court has no authority to modify the alimony award. *Newman v. Newman*, 161 Ohio St. 247 (1954); *Popovic v. Popovic*, 45 Ohio App. 2d 57 (1975); *McClain v. McClain*, 26 Ohio App. 2d 10 (1971); *Clelland v. Clelland*, 110 Ohio App. 546 (1959).

Although the law was changed in *Wolfe v. Wolfe*, 46 Ohio St. 2d 399, 421-422 (1976), the Supreme Court specifically limited the change to decrees entered after the judgment in *Wolfe*.

For these reasons, this court is compelled to deny the motion to modify.

Plaintiff to submit entry in conformity herewith.

/s/ HANS R. VEIT
Judge

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT OF THE COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO

Case No. 49915

IN THE COURT OF COMMON PLEAS
DEPARTMENT OF DOMESTIC RELATIONS
LAKE COUNTY, OHIO

EVELYN SUPANICK,
Plaintiff,

vs.

DANIEL J. SUPANICK,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

FINDINGS OF FACT

1. On December 18, 1968, the parties signed a separation agreement.

2. The plaintiff wife received the marital home and almost all marital assets with the exception of a car and some stocks she agreed to hold for the benefit of the parties' minor daughter.

3. In addition to such liberal property settlement, defendant husband agreed to pay to the wife $309.00 per month as alimony until she remarried or died.

4. Except for the house and Arizona property mortgage installments, which were considered to arrive at the

$309.00, said monthly alimony payments were intended as support and were not related to the division of property between the parties.

5. Defendant husband signed said separation agreement in the belief held contrary to the unambiguous terms of the agreement, that his obligation to pay alimony would end after five years.

6. The case proceeded to judgment on an uncontested basis and the separation agreement became a court order in April 1969.

7. Circumstances have changed in that plaintiff wife is making her own living in Florida, she owns a house mortgage free, the minor child of the parties is an adult and emancipated.

8. In 1969, the defendant husband earned approximately $13,000.00, and in 1979 his earnings will be approximately $30,000.00, per year.

9. There was no credible evidence as to fraud or mutual mistake at the time the agreement was signed.

10. There is no reservation of jurisdiction in the separation agreement.

11. The parties have stipulated that defendant is in arrears on the order of monthly installments of alimony in the sum of $1,545.00.

CONCLUSIONS OF LAW AND JUDGMENT

1. Without a reservation of jurisdiction the Court has no authority to modify the alimony award.

2. The law enunciated the *Wolfe v. Wolfe*, 46 Ohio St. 2d 399 (1976) can only be applied to decrees entered after the judgment in the *Wolfe Case*.

3. Defendants motion to modify or vacate is overruled and judgment is hereby entered accordingly.

4. Plaintiff's motion for judgment for the accrued unpaid arrearage is granted. Judgment is hereby entered in favor of plaintiff against defendant in the sum of $1,545.00 and costs.

/s/ HANS R. VEIT
Judge

Opposition

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No. 81-654

In the Supreme Court of the United States

October Term, 1981

DANIEL J. SUPANICK,
Petitioner,

vs.

EVELYN SUPANICK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied equal protection of the law when the Supreme Court of Ohio refused to permit the courts of Ohio to consider his (and all those similarly situated) motion to modify his divorce and alimony decree on the basis that such decree had been entered prior to June 23, 1976 although it permitted a modification in *Wolfe v. Wolfe* (1976), 46 Ohio St. 2d 399 even though the decree therein had been entered in 1968.

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TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Respondent does not disagree with the Statement of the Case as presented by Petitioner, but the Court's attention should be directed to the portion of the decision in *Wolfe v. Wolfe,* which clearly explained why the Court directed the lower courts to apply such decision only prospectively.

> "In holding herein that modification jurisdiction continues as to alimony sustenance awards, even though based upon agreements of the parties, we perceive that immeasurable difficulties will arise in attempting to judicially determine the character of the award in a given case. Therefore, while we apply the rule here because the separation is clearly manifested, our holding herein is to be applied prospectively only to decrees incorporating separation agreements entered after the date of this judgment." *Wolfe v. Wolfe,* 46 Ohio St. 2d 399 (1976) (at 422).

ARGUMENT

Rule 21(h) of the Supreme Court Rules governing a petition for certiorari clearly dictates that if review of a state court's judgment is sought, the statement of the case must specify the stage of the proceeding both in the trial court and in the appellate court when such questions sought to be reviewed were raised. The manner or method of raising them and the way in which they were passed upon by the court must also be specified. It must be shown that the Federal question was timely and properly raised so as to give the Supreme Court jurisdiction to review the judgment on a writ of certiorari.

It is clear from the Appendix in Petitioner's Petition for Writ of Certiorari that the constitutional question now raised was never raised in the trial court nor in the Court of Appeals. When such questions are not properly raised in state court proceedings, the question is not open upon a Petition for Certiorari. *Ellis v. Dixon*, 349 U.S. 458 (1955).

It is axiomatic that such alleged constitutional violations must be raised at the earliest possible time and carried through each proceeding before the Supreme Court can have jurisdiction to determine such upon a Petition for Writ of Certiorari.

The Constitution of the United States neither prohibits nor requires retrospective application of judicial decisions.

> "However, we believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the federal constitution has no voice upon the subject.'

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, 381 U.S. 618 (1964) at 629.

The court in determining whether or not a decision should be applied retrospectively must do so in light of the merits and demerits of that particular case. In an appropriate case, a court, in the interest of justice, may make the rule prospective and there is much to be said in favor of such a rule for cases arising in the future. *Linkletter v. Walker, supra.*

It is therefore clear that the Supreme Court of Ohio had ample constitutional authority to determine that its ruling in *Wolfe v. Wolfe, supra,* should only be applied prospectively. In support thereof, Justice Brown clearly delineated his reason for so doing and to alleviate any further difficulty in that area, the decision in the within case clearly reiterated the Court's position that modification jurisdiction as to alimony sustenance awards, even though based upon agreements of the parties, would present immeasurable difficulties in attempting to judicially determine the character of the award, and therefore the proposition should only be applied prospectively.

It is interesting to note that the sole issue raised in that appeal was whether or not the ruling in *Wolfe* should be applied retroactively and not whether such application constituted a violation of equal protection of the law.

CONCLUSION

It is respectfully submitted that this Court should not grant Petitioner's request for a Writ of Certiorari for procedural and substantive reasons. It is not a violation of the equal protection of the laws for a court to apply its rulings prospectively.

Respectfully submitted,

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